SUPREME COURT, U. S.

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FILED
SEP 4 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No. 476

JAMES SHROUT, d/b/a THE SHROUT AGENCY,

Petitioner,

vs.

McDONALD'S SYSTEM, INC., an Illinois corporation, and RAY KROC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

WILLARD LASSERS,
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JAMES SHROUT, d/b/a THE SHROUT AGENCY,

Petitioner,

vs.

McDONALD'S SYSTEM, INC., an Illinois corporation, and RAY KROC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois entered in the above entitled case on May 28, 1968.

CITATION TO OPINIONS BELOW.

The Circuit Court of Cook County, Illinois filed no opinion. The Appellate Court of Illinois, First District,

filed two opinions. The original opinion was filed on December 1, 1967 (App. 1a)[1]. A corrected opinion was filed on January 24, 1968, after denial of petition for rehearing and is reported in 90 Ill. App. 2d 60, 234 N.E. 2d 451, 1967 (App. 16a). No opinion was filed by the Supreme Court of Illinois.

JURISDICTION.

The Supreme Court of Illinois denied Petition for Leave to Appeal on May 28, 1968 (App. 37a). The mandate of the Supreme Court of Illinois was issued to the Appellate Court of Illinois, First District, on June 19, 1968 (App. 38a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

[1] The symbol (App. ....) refers to the Appendix, *infra*.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

Amendment 14 to the United States Constitution, in pertinent part, reads as follows:

> "... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..."

Article II, § 5 of the Illinois Constitution of 1870 (App. 39a). Chapter 110, § 48 (I.R.S., 1967) (App. 40a).

QUESTIONS PRESENTED.

(1) Does a finding of fact by an Appellate Court, without the opportunity to have a full and complete hearing, constitute a violation of the right to due process of law?

(2) Does a finding of fact by an Appellate Court, which is a complete departure from the state law requiring a jury trial when such is demanded in apt time, violate a right to equal protection of the laws?

STATEMENT OF THE CASE.

During May of 1957, petitioner and McDonald's System, Inc., entered into an oral agreement whereby petitioner agreed to service the advertising needs of McDonald's System, Inc., and McDonald's agreed to pay petitioner a reasonable compensation for such service (A. 2)[2]. Petitioner thereupon devised a unique advertising program for McDonald's, seeking to conserve McDonald's capital and to keep McDonald's borrowing power as unencumbered as possible (A. 2-6). Petitioner was never reasonably compensated for this unique program (A. 6-11), even though McDonald's began to make large sums of money (A. 11).

By the Spring of 1961, petitioner's financial situation was steadily deteriorating, while McDonald's was obviously thriving. McDonald's had not honored certain guarantees, which was the primary cause for petitioner's deteriorating financial condition. McDonald's summoned petitioner to its office in Chicago, Illinois, in Spring, 1961, and informed petitioner that the then existing contractual relationship between McDonald's and petitioner must be terminated and that they must enter into a new written contractual relationship. Though petitioner objected to the restrictive nature of the proposed agreement, McDonald's was immovable and even informed petitioner that the alternative to a new contract was summary dismissal (A. 11-12). As a result of the pressure brought

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[2] The symbol (A. ....) refers to the Abstract of the Petitioner, filed in the Illinois Appellate Court.

to bear, petitioner signed a written contract with McDonald's which contained the following language:

> "The parties hereto desire to enter into the present agreement and thereby revoke and cancel all previous agreements, contracts and commitments relating to the advertising and promotion programs heretofore entered into by said parties. . . ." (A. 20)

The new contract was signed on June 12, 1961, and on September 1, 1961, a little over two months later, McDonald's gave notice of its intention to terminate petitioner's contract as of December 31, 1961.

The foregoing facts were set forth in count one of the petitioner's amended complaint (A. 2-13). The respondents filed a motion to dismiss the amended complaint, with documents and affidavits attached (A. 20-27). On the narrow basis of that amended complaint and the motion, the trial court dismissed counts one, two and three of the amended complaint. Thereupon, petitioner appealed this order to the Appellate Court of Illinois, First District. No facts were found by the trial court.

The Appellate Court, in its decision of December 1, 1967, as modified on January 24, 1968, stated the following on pages 3 and 4 of the opinion:

> "Plaintiff's Claim under Count I is barred by the contract of June 12, 1961, which expressly states that the parties thereto revoke and cancel 'all previous agreements, contracts and commitments relating to the advertising and promotion programs' theretofore entered between the parties. The contention that an action in *quantum meruit* is 'an action off the contract and not on the contract' is unavailing inasmuch as there did in fact exist between the parties a fully executed express contract. See *Goodman*

v. *Motor Products Corp.*, 22 Ill. App. 2d 378, 384-385. . . .

"The cases cited by Plaintiff in support of his position that an action in *quantum meruit* may be maintained under these circumstances are inapposite on their facts. The parties complaining in those cases received either none or only part of the compensation although the oral contract called for 'reasonable compensation' and plaintiff did not object to the amounts received. See for example *Huehl* v. *Monarch Refrigerating Co.*, 157 Ill. App. 145; *United States* v. *Traylor Bros., Inc.*, 133 F. Supp. 104; *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 161 Fed. 2d 811". (App. 18a-20a)

The only evidence before the trial court and the Appellate Court regarding the alleged "fully executed" oral contract is the following statement from the affidavit of John H. Horn filed in support of respondents' motion to dismiss the amended complaint of petitioner:

"3. Prior to June 12, 1961, Shrout was paid a total of $38,801.88 by McDonald's for all advertising services, advertising and supplies performed and furnished by Shrout pursuant to all oral understandings between Shrout and McDonald's which were then in effect. At no time during this period did Shrout refuse or fail to cash checks in connection with said payments and at no time did he claim that such payments were in violation of any oral understanding with McDonald's. At no time during this period did Shrout claim any interest or property right in any of the ideas, symbols, slogans, designs or other matter produced by him for McDonald's in the course of his advertising agency relationship with McDonald's. . . . ." (Appellees' Supplemental Abstract pp. 31-32).

Petitioner denied that the $38,801.88 was "reasonable compensation" for his services in his answer to the

motion to dismiss the complaint, filed below, and in his affidavit as follows:

> "2. As to the allegations in paragraph 1, Plaintiff denies that he has already been compensated for his services rendered prior to June 12, 1961. Paragraph 7 of the Complaint herein and paragraph 2 (a) of the Affidavit of JAMES SHROUT, cited by the Defendants, clearly recite that the compensation given to the Plaintiff by the Defendant, McDONALD'S SYSTEM, INC., (hereinafter called McDONALD), was wholly inadequate in light of the great number of services performed by the Plaintiff for McDONALD, and the ideas and creations provided for McDONALD by the Plaintiff. Paragraph 3 of the Affidavit of JAMES SHROUT outlines clearly the services, ideas and creations which the Plaintiff produced for McDONALD prior to June 12, 1961. The sum of $38,801.88 paid to the Plaintiff by McDONALD prior to June 12, 1961, for the services, ideas and creations of the Plaintiff, as outlined in the Affidavit of JOHN N. HORN [sic] attached to the Motion, is a pittance in comparison with the reasonable value of Plaintiff's work for McDONALD." (Answer, R. 47)(*).
>
> "2. The Affidavit of JOHN H. HORN contains a number of misstatements and omissions, among which are the following:
>
> "(a) As to Paragraph 3 of the HORN Affidavit, although it is true that prior to June 12, 1961, McDONALD's Licensees paid SHROUT for certain advertising services and merchandise, the HORN Affidavit fails to point out the fact that the sums paid SHROUT were far less than the services rendered by SHROUT to McDONALD, and the debts that SHROUT had to assume on behalf of McDONALD." (Affidavit, R. 54).

(*) The symbol (R. ....) refers to the Record.

Upon filing the original complaint in this matter, petitioner demanded a jury (R. 3).

On May 28, 1968, the Supreme Court of Illinois denied petitioner's petition for leave to appeal from the decision of the Appellate Court (App. 37a). The federal questions were first presented in the petition for leave to appeal (App. 22a).

REASONS FOR GRANTING THE WRIT.

(I)

The fact finding by the Appellate Court of Illinois, First District, affirmed by the Supreme Court of Illinois, without giving the petitioner the opportunity to have a full and complete hearing, deprived the petitioner of a valuable property right without due process of law.

In its opinion, the Appellate Court of Illinois, First District, admitted in substance that the amended complaint of the petitioner stated a good cause of action in *quantum meruit* (App. 18a-20a). However, the Appellate Court further stated that the oral contract between petitioner and respondent, McDonald's, was fully executed; namely that petitioner was fully paid thereunder (App. 19a)[4]. That Court based its finding solely on a paragraph of the affidavit of John H. Horn, attached to respondents' motion to dismiss the amended complaint, *supra* p. 6.

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[4] The Appellate Court first based this finding of fact upon the alleged fact that respondent McDonald's had received invoices and had paid these invoices, petitioner receiving these payments without protest (App. 2a, 4a). Petitioner pointed out that there was nothing in the pleadings which justified this conclusion in his petition for rehearing (App. 10a). The Appellate Court corrected its opinion on January 24, 1968, by stating that its finding of fact was now based upon the alleged fact that petitioner received payments prior to June 12, 1961, without protest (App. 17a, 18a). This alleged fact was merely a recital in an affidavit, no hearing having been held to give petitioner an opportunity to present evidence.

Petitioner completely denied the statements of this paragraph in count one of his amended complaint (A. 1-13). He also denied the statements in his answer to respondents' motion to dismiss the original complaint of petitioner and his attached affidavit, *supra* p. 7.

In essence, petitioner claimed that he was not fully paid for work done under the oral agreement and respondents claimed that he was. The Appellate Court admitted that petitioner would have a good cause of action in count one if he were not fully paid. It then proceeded to determine that he was fully paid on the basis of conflicting statements in the pleadings, without a prior hearing and finding of fact by the trial court.

In *Saunders* v. *Shaw*, 244 U.S. 317, 61 L. ed. 1163, 37 S. Ct. 638 (1917), a state appellate court determined an issue of fact and entered judgment thereon on the basis of the pleadings alone. The party to whom the finding was adverse had no opportunity to present evidence on that issue. The Court decided that such a finding of fact and judgment was a violation of due process of law, contrary to the Fourteenth Amendment. In the case at hand, the Appellate Court of Illinois found as a fact that petitioner had been fully compensated for his services pursuant to the oral agreement. Thereupon, it affirmed the order dismissing the amended complaint in the trial court below. Petitioner never had the opportunity to present evidence that, in fact, he had not been fully compensated. Such a finding, based on the pleadings alone, deprived the petitioner of a valuable property right, namely his claim of compensation for work done, without due process of law. See also *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U.S. 673, 74 L. ed. 1107, 50 S. Ct. 45 (1930).

The principle that a person is not to be judged in a court of law without the opportunity for a full and effective hearing has long been established by this Court. In *Hovey* v. *Elliott,* 167 U.S. 409, 42 L. ed. 215, 17 S. Ct. 841 (1897), this Court found that a judgment was void for want of due process of law, because it had been obtained by way of default after the answer of the defendant had been struck as a consequence of the defendant's being found in contempt of court. On the same basis, the dismissal of the claim of petitioner without opportunity to have a full and effective hearing to present evidence that he was indeed not paid for services rendered pursuant to the oral agreement, deprived him of property without due process of law.

In the *Hovey* case, the Court relied upon the prior decisions of *McVeigh* v. *The United States,* 11 Wall. 259, 20 L. ed. 80 (1871) and *Windsor* v. *McVeigh,* 93 U.S. 274, 23 L. ed. 914 (1876). In both of those cases, judgments of forfeiture of property had been entered. In each case, the claimant to the property had entered an appearance and answer and the court had struck both the appearance and answer in each instance, because the claimant was alleged to be an enemy alien, since he was a member of the government of the confederate states. Thereupon, judgment was entered by default and the properties in question were confiscated. In both cases, the Court found that the claimant had been deprived of his property without due process of law, since he had not been given the opportunity to have a full and effective hearing of his claim.

More recently, the Court, in determining that trust companies had to give notice, by mail at least, to beneficiaries whose whereabouts and interests were known to

the trust companies and that notice by publication was not consistent with the due process of law, whenever the rights of such beneficiaries were involved in litigation, stated the following:

> "Many controversies have raged about the cryptic and abstract words of the due process clause, but there can be no doubt that at a minimum they require the deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Trust Company*, 339 U.S. 306, 94 L. ed. 865, 70 S. Ct. 652 (1950).

In the present case, it is clear that petitioner was not given an "opportunity for hearing appropriate to the nature of the case" in order to prove that he was not fully compensated pursuant to the oral agreement. In this connection, we respectfully call attention to the dissenting opinion of Justice Fortas, joined by Justice Douglas, to the denial of Certiorari in *Sandoval* v. *Rattikin*, 386 U.S. 901, 17 L. ed. 2d 132, 87 S. Ct. 199 (1966). The act of a state court is state action as that term is used in the Fourteenth Amendment; *Shelly* v. *Kraemer*, 334 U.S. 1, 92 L. ed. 1161, 68 S. Ct. 836 (1948).

On the basis of the foregoing, petitioner maintains that the finding of fact by the Appellate Court of Illinois, that petitioner was fully paid pursuant to the oral agreement, and the consequent dismissal of his amended complaint, without opportunity to a full and complete hearing on that question of fact, deprived the petitioner of property, contrary to his right to due process as guaranteed by the Fourteenth Amendment.

Accordingly, petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that

it may decide this important question of constitutional law.

(II)

The fact finding by the Appellate Court of Illinois, First District, affirmed by the Supreme Court of Illinois, was a complete departure from the Illinois rule of having a jury decide questions of fact where a trial by jury is demanded in apt time, thereby violating the right of petitioner to equal protection of the laws.

At the time of the filing of his original complaint, petitioner demanded a trial by jury (R. 3). Article II, § 5, of the Illinois Constitution of 1870 states in pertinent part as follows:

> "The right of trial by jury as heretofore enjoyed shall remain inviolate. . . ." (App. 39a).

As an implementation of this constitutional provision, Illinois has passed the following legislation regarding the finding of facts by a judge during a hearing of a motion to dismiss a complaint:

> ". . . (3) If, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer *and shall so deny it if the action is one at law and a jury demand has been filed by the opposite party in apt time.*" (Emphasis added). Ch. 110, § 48, I.R.S. (1967). (App. 41).

The constitutional guarantee of the Illinois Constitution of a right to trial by jury has been consistently

interpreted by the courts of Illinois so as to require a resolution of any dispute of fact in any lawsuit by a jury, whenever a demand is made in apt time.

> "Clearly, the Constitution does, and Judges should, carefully preserve the right of the parties to have a substantial factual dispute resolved by the jury for it is here that assessment of the credibility of witnesses may well prove decisive." *Pedrick* v. *Peoria & Eastern RR Co.*, 137 Ill. 2d 494, 229 N.E. 2d 504 (1967).

This same position is set forth in the following Illinois cases:

> *Manion* v. *Brant*, 85 Ill. App. 2d 129, 229 N.E. 2d 171 (1967).
>
> *Willoughby* v. *Moyer*, 5 Ill. App. 2d 462, 200 N.E. 2d 522 (1964).
>
> *Diversey Liquidating Corporation* v. *Neunkirchen*, 370 Ill. 523, 19 N.E. 2d 363 (1939).

The Appellate Court decided a substantial question of fact by determining that the petitioner had been fully compensated for his services performed pursuant to the oral agreement with McDonald's, even though there was considerable dispute between the parties on this question, *supra* pp. 6-7. By making this determination, the Appellate Court deprived petitioner of his right to a jury trial on this question, even though the law in Illinois is clear beyond dispute that persons in positions similar to that of petitioner are given a trial by jury.

Judicial action is state action within the meaning of the Fourteenth Amendment. *Shelley* v. *Kraemer*, *supra* p. 12. By denying petitioner the right to have this question of fact resolved by a jury, while others similarly

situated have been granted a jury trial, the State of Illinois, through its Appellate Court, denied him equal protection of the laws. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 30 L. ed. 220, 6 S. Ct. 1064 (1886); *Shelley* v. *Kraemer*, *supra* p. 12. In *Cochran* v. *Kansas*, 316 U.S. 255, 86 L. ed. 1453, 62 S. Ct. 1068 (1942), the Court determined that a prison inmate denied the privilege of appeal by actions of state officials, while others convicted of crimes were allowed such appeals, suffered a violation of his rights to equal protection of the laws. Likewise, petitioner suffered a violation of his rights to equal protection by a denial of his jury trial.

Accordingly petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of constitutional law.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Appellate Court of Illinois, First District, filed 12-1-67

Mr. Justice Burke Delivered The Opinion Of The Court:

James Shrout, doing business as The Shrout Agency, filed an amended complaint consisting of three counts against McDonald's System, Inc., and Ray Kroc, president of McDonald's, demanding damages in the sum of $800,000 on a *quantum meruit* theory against McDonald's alone, in the sum of $45,000 on an inducement to a breach of contract theory against McDonald's alone, and of $1,661,000 on the theory of a conspiracy to interfere with contractual and other property rights against both McDonald's and Kroc. Defendants' motion to dismiss the amended complaint was allowed, and plaintiff appeals.

Count I of the amended complaint alleged that plaintiff and McDonald's entered into an oral agreement in May, 1957 whereby plaintiff agreed to provide advertising services for McDonald's in return for a "reasonable compensation." It was further alleged that plaintiff performed these services but was not reasonably compensated therefor. On June 12, 1961, the parties canceled the oral agreement and entered into a written agreement containing the following language:

> "The parties hereto agree to enter the present agreement and hereby revoke and cancel all previous agreements, contracts and commitments relating to the advertising and promotion programs heretofore entered into by said parties. . . ."

(Appendix A)

On September 1, 1961, McDonald's gave notice to plaintiff that the second contract would be terminated as of December 31, 1961.

Count II alleged that as advertising agent for McDonald's plaintiff procured the services of National Advertising Company, also known as Nadco, to furnish highway advertising for the holders of McDonald's franchises. In April, 1960 Nadco and McDonald's entered into an agreement in which Nadco recognized plaintiff as the advertising agent of McDonald's and agreed to pay plaintiff 15% of all monies received by it for its services as a commission. The count further alleged that in December, 1961, McDonald's directed Nadco to cease payments of the commissions to plaintiff, thereby interfering with plaintiff's contractual rights.

Count III alleged that on or about June 12, 1961, and for some time prior thereto, defendant Kroc, individually and as president of McDonald's, engaged in a course of conduct with McDonald's designed to deprive plaintiff of receipt of a reasonable compensation for his services as advertising agent of McDonald's.

Defendants' motion to dismiss the amended complaint was accompanied by affidavits and exhibits which revealed the following:

Pursuant to the oral contract of May, 1957, plaintiff performed the services required thereunder for which he periodically submitted invoices to McDonald's. The invoices were paid by McDonald's, amounting to a total of $38,801.88, and plaintiff cashed all payment checks and at no time protested the amounts of money he re-

ceived. For some time prior to June, 1961, plaintiff failed to make payments to suppliers of merchandise and to the media which advertised McDonald's products for their services and merchandise as he was required to do, and a written agreement was entered between plaintiff and McDonald's on June 12, 1961, terminating the oral agreement of May, 1957, and requiring plaintiff to furnish advertising services for an agreed compensation. From June 12, 1961, until December 31, 1961, when, as permitted under the contract, McDonald's terminated the contract, plaintiff rendered services as agreed in the written contract and submitted invoices in the amount of $25,431.65 for these services, which invoices were paid by McDonald's.

Before it terminated plaintiff's contract on December 31, 1961, McDonald's notified Nadco, on December 28, 1961, to cease all commission payments to plaintiff. Pursuant to this direction Nadco ceased the payments and plaintiff instituted legal action against it to recover certain commissions. Plaintiff thereafter received a consent judgment against Nadco in the amount of $11,000 and in return gave Nadco a general release from liability for further payments. The parties to the instant action subsequently filed a stipulation below to the effect that plaintiff herein was not demanding and was not entitled to actual damages against McDonald's under Count II and that it was seeking only punitive damages thereunder.

Plaintiff maintains that the contract of June 12, 1961, does not bar his claims set out in the amended complaint which alleges valid causes of action in *quantum meruit*,

inducement to breach of contract, and conspiracy to deprive plaintiff of his reasonable compensation as advertising agent of McDonald's.

Plaintiff's claim under Count I is barred by the contract of June 12, 1961, which expressly states that the parties thereto revoke and cancel "all previous agreements, contracts and commitments relating to the advertising and promotion programs" theretofore entered between the parties. The contention that an action in *quantum meruit* is "an action off the contract and not on the contract" is unavailing inasmuch as there did in fact exist between the parties a fully executed, express contract. See *Goodman* v. *Motor Products Corp.*, 22 Ill. App. 2d 378, 384-385.

Plaintiff is further barred from recovery under this count for the reason that the dealings between plaintiff and McDonald's under the oral contract resulted in an account stated between the parties which plaintiff is now estopped to deny. Throughout the term of the oral contract plaintiff periodically submitted invoices to McDonald's for his services as advertising agent. The invoices were paid by McDonald's and the monies were accepted by plaintiff. It was not until some two and one-half years after the oral agreement was terminated that plaintiff determined he was entitled to more compensation under the oral contract than he had in fact received and accepted without contest. (See 1 C.J.S. Account Stated § 1 et seq.)

The cases cited by plaintiff in support of his position that an action in *quantum meruit* may be maintained under these circumstances are inapposite on their facts.

(Appendix A)

The parties complaining in those cases received either none or only part of the compensation called for under the original contract before it was altered or abandoned. Here, however, plaintiff seeks additional compensation although the oral contract called for "reasonable compensation" and plaintiff did not object to the amounts when received. See for example *Huehl* v. *Monarch Refrigerating Co.*, 157 Ill. App. 145; *United States* v. *Traylor Bros., Inc.*, 133 F. Supp. 104; *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 161 Fed. 2d 811.

Plaintiff's second contention is that McDonald's was guilty of malicious interference with his contractual rights in giving notice to Nadco to cease commission payments to him and that for this reason he is entitled to punitive damages from McDonald's. Plaintiff, however, fails to take into consideration that McDonald's gave notice to him that his contract was being terminated as of December 31, 1961, as it had a right to do under the terms of the contract, and that McDonald's accordingly served notice on Nadco to discontinue commission payments to plaintiff three days before the contract was terminated. Furthermore, plaintiff thereafter filed an action against Nadco and recovered $11,000 in commissions owing to plaintiff. It was stipulated below between the parties hereto that plaintiff was not entitled to actual damages from McDonald's under Count II, but that he was seeking solely punitive damages thereunder. Where actual damages are not recoverable, there can be no award of punitive damages. *Reeda* v. *The Tribune Co.*, 218 Ill. App. 45; *Madison* v. *Wigal*, 18 Ill. App. 2d 564. Assuming arguendo that Count II sounds in tort, as

plaintiff maintains, plaintiff's recovery from and release of Nadco bars any recovery from McDonald's. See *Koltz* v. *Jahaaske,* 312 Ill. App. 623, 627-628.

Plaintiff cites *Northern Ins. Co. of New York* v. *Doctor,* 23 Ill. App. 2d 225, in support of the proposition that McDonald's fraudulently induced Nadco to break its contract with plaintiff. In that case the defendant fraudulently induced a release from the injured party plaintiff for an amount of the loss suffered over and above the amount which plaintiff insurance company's policy of insurance would cover, thereby leaving the latter without subrogation recourse against the principal defendant. Here, however, McDonald's merely informed Nadco that plaintiff's contract was being terminated and that plaintiff was therefore no longer entitled to commissions.

The final point urged is that defendants conspired with each other to deprive plaintiff of his rightful and reasonable compensation as an advertising agent for McDonald's. It is well settled that a corporation can act only through its agents, and consequently there can be no conspiracy between a corporation and its agents. *John Deere Co.* v. *Metzler,* 51 Ill. App. 2d 340, 355. None of the cases cited by plaintiff in support of his position in this regard involve a conspiracy between a principal and its agents.

The acts which plaintiff claims to have been the subject of the conspiracy, namely depriving him of his commissions, amounted to nothing more than the acts of an employer paying plaintiff for services rendered to which no objections were made at the time. A combination to

perform an act is not of itself wrongful; the act performed or sought to be performed must be wrongful and thereby lend its character to the combination. An actionable wrong cannot be made out by "vituperous and profuse interpolation of adjectives characterizing the act to be done as wrongfully done." *Skolnick* v. *Nudelman*, 71 Ill. App. 2d 424, 428.

For these reasons the judgment is affirmed.

Judgment Affirmed.

LYONS, P.J., and BRYANT, J., concur.

APPENDIX B

Petition for Rehearing, filed 1-10-68

Petitioner-Appellant prays for a rehearing by this Court of its decision of December 1, 1967, affirming the judgment below.

The first two sentences of the Fourth paragraph on page 2 of the Court's opinion read as follows:

> "Pursuant to the oral contract of May, 1957, plaintiff performed the services required thereunder for which he periodically submitted invoices to McDonald's. The invoices were paid by McDonald's, amounting to a total of $38,801.88, and plaintiff cashed all payment checks and at no time protested the amounts of money he received."

The first paragraph of page 4 of this Court's opinion reads as follows:

> "Plaintiff is further barred from recovery under this count for the reason that the dealings between plaintiff and McDonald's under the oral contract resulted in an account stated between the parties which plaintiff is now estopped to deny. Throughout the term of the oral contract plaintiff periodically submitted invoices to McDonald's for his services as advertising agent. The invoices were paid by McDonald's and the monies were accepted by plaintiff. It was not until some two and one-half years after the oral agreement was terminated that plaintiff determined he was entitled to more compensation under the oral contract than he had in fact received and accepted without contest. (See 1 C.J.S. Account Stated § 1 et seq.)"

(Appendix B)

Plaintiff respectfully submits that this Court assumes in the above paragraphs that he submitted invoices to McDonald's during the term of the oral contract, which McDonald's paid. A close examination of the entire record in this matter reveals that the Petitioner-Appellant submitted invoices to McDonald's for payment, *subsequent to June 12, 1961, for services rendered pursuant to the contract of June 12, 1961.* Thus, the Affidavit of John H. Horn, the Advertising Agent of Defendant:

> "During and subsequent to the period of the agreement of June 12, 1961, from said date to December 31, 1961, McDonald's paid to Shrout, pursuant to said agreement, or for his account, a total of $25,493.45 for advertising services, advertising and supplies. Certain of said payments are reflected in invoices from Shrout and the cancelled checks bearing Shrout's endorsements. Said invoices and cancelled checks are attached hereto as Exhibit B. Said payments, totaling $21,885.75, were received by Shrout pursuant to said agreement, and at no time did he ever refuse any said payments. The remaining payments, totaling $3,607.70, were made by McDonald's for Shrout's account as follows:

(1)	to Internal Revenue Service, Chicago, Illinois, on December 4, 1962, pursuant to income tax notice of levy dated October 25, 1961	$ 956.78
(2)	To Curt Teich & Company, Inc., Chicago, Illinois, on April 8, 1963, as guarantor of certain of Shrout's debts of Curt Teich & Company, Inc.	2,650.92
	Total	$3,607.70

> Said payments for Shrout's account are evidenced by cancelled checks attached hereto as Exhibits C and D. Although only $3,545.90 was owed to Shrout by McDonald's, pursuant to invoices rendered under the June 12, 1961 agreement, McDonald's paid an additional amount of $61.80 for Shrout and wrote this amount off its books as additional interest expense." (Appellant's Supplemental Abstract pp. 25-26).

The record further reveals that McDonald's paid $38,-801.88 to Petitioner-Appellant, prior to June 12, 1961, *without receiving invoices from the Petitioner-Appellant.* A second and later Affidavit of John H. Horn states the following:

> "Prior to June 12, 1961, Shrout was paid a total of $38,801.88 by McDonald's for all advertising services, advertising and supplies performed and furnished by Shrout pursuant to all oral understandings between Shrout and McDonald's which were then in effect. At no time during this period did Shrout refuse or fail to cash checks in connection with said payments and at no time did he claim that such payments were in violation of any oral understanding with McDonald's . . . (Appellant's Supplemental Abstract, p. 31).

Since no invoices were submitted to McDonald's by Shrout during the oral contract, the Court's position that an account stated resulted from the acts of the Petitioner-Appellant and McDonald's is completely unfounded in fact.

In the above quoted paragraphs, the Court lays stress on the fact that plaintiff filed suit in this matter two and one-half years after the oral agreement was termi-

nated. Petitioner-Appellant would like to point out to the Court that since the action was brought within the period allowed by the Statute of Limitations, there is no legal significance to be attached to the period of time between the termination of the oral agreement and the bringing of this action. The Court is in error in relying upon that length of time in determining that Petitioner-Appellant asserts no cause of action in Count I of the Amended Complaint.

In the above paragraphs, the Court also relies on the statements by McDonald's that Petitioner-Appellant received sums of money prior to June 12, 1961, without protest. Petitioner-Appellant calls the Court's attention to page 53 and page 54 of the record where his Affidavit explains the circumstances under which he received the payment of $38,801.88. These circumstances make it clear that the Court is in error in concluding that Petitioner-Appellant's acceptance of these payments without protest constitutes an implicit agreement that this was all the monies due and owing for his advertising services and no more, since he accepted them on the basis of certain promises made by McDonald's, which promises were never fulfilled by McDonald's.

The Court's position that the payments received by the Petitioner-Appellant resulted in an account stated, which he is now "estopped" to deny, is unsupported by the law relating to actions on account. Examination of all of the text cited by the Court from Corpus Juris Secundum, pp. 579-636, fails to reveal any such doctrine of "estoppel". An action on account is based upon an account submitted by a Plaintiff to a Defendant prior to the

institution of the action, which the Defendant has not protested and has not paid. Such an account cannot be used by a Defendant as an *absolute* defense, to preclude a Plaintiff from introducing evidence and proving that the Defendant owes him money in excess of the amounts shown in the account.

In this instance, Petitioner-Appellant claims that he was not paid reasonable compensation pursuant to the oral agreement prior to June 12, 1961. McDonald's cannot ask for a dismissal of that cause merely by asserting that it paid Petitioner-Appellant $38,801.88, and that Petitioner-Appellant accepted these payments without protest.

Petitioner-Appellant is entitled to a full and complete trial, is entitled to introduce evidence to prove that he was not reasonably compensated as required by the oral contract, and that the reasonable value of his material, ideas and services are far in excess of the amounts he received. If not, then McDonald's is allowed to defeat the action in *quantum meruit* by a mere assertion without a hearing, which deprives the Petitioner-Appellant of a trial on the merits.

Throughout its opinion, the Court makes the factual assumption that the oral contract prior to June 12, 1961, was fully executed. This is an evidentiary determination by this Court without foundation in the record. In his Affidavit filed below, Petitioner-Appellant denied that he ever received the reasonable compensation required by the oral contract and denied that the contract was "fully executed" (Record, pp. 54 & 56). In the Answer to the

original Motion to Dismiss filed below, the Petitioner-Appellant alleged the following:

> SHROUT and THE SHROUT AGENCY have never been fully compensated for the creation and conception of the ideas and the material which are the subject of this action (Record, page 45).

Throughout Count I of the Amended Complaint, Petitioner-Appellant repeatedly asserted that he was never reasonably compensated pursuant to the terms of the oral contract (Appellant's Abstract, pp. 2-13). The Record simply does not support this evidentiary conclusion by the Court.

In connection with the assumptions of fact made by the Court in its opinion, the Court should realize that it and the trial Court below must deny a Motion to Dismiss if it is based on disputed facts, when a jury has been demanded in apt time.

> § 48 (Civil Practice Act, § 48). Involuntary dismissal based upon certain defects or defenses
> ". . . (3) If, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer *and shall so deny it if the action is one at law and a jury demand has been filed by the opposite party in apt time.*"

(Appendix B)

Petitioner-Appellant has demanded a jury in apt time (Record p. 3) and this is an action at law. So long as this Court and the trial Court below have based their decisions on certain factual determinations made by each, which are matters of dispute by the parties, then this Court has no choice than to reverse the trial Court below and instruct the trial Court to deny the motion.

In the final paragraph on page 3 of the Court's opinion, this Court cites the case of *Goodman* v. *Motor Products Corp.*, 22 Ill. App. 2d 378, 384-385, to support the Court's position that an action in *quantum meruit* is barred in the instant case. In that case, the Appellate Court stated the following:

> "The conclusion in these cases is that only when parties do not expressly agree, *or where an express agreement is unenforceable,* the law imposes and raises a promise to pay for services performed or goods furnished under circumstances justifying an implied agreement to compensate." *Goodman* v. *Motor Products Corp.*, 22 Ill. App. 378, 161 N.E. 31, at 34 (1959) (emphasis added).

In the *Goodman* case, the action in *quantum meruit* was not proper because the original contract was still valid and subsisting. In this case, the express agreement is unenforceable by reason of the contract of June 12, 1961, so that an action in *quantum meruit* is proper, and is a means to prevent the injustice of valuable work being denied payment. For that reason, the *Goodman* case supports the position of the Petitioner-Appellant, but is totally inapplicable to bar Petitioner-Appellant's action.

(Appendix B)

On page 4 of the opinion, this Court states that the cases cited by the Petitioner-Appellant are not in point because the parties concerned in these cases received "either none or only part of the compensation called for under the original contract before it was altered or abandoned." *This is exactly the position taken by the Petitioner-Appellant in Count I of the Amended Complaint.* He is claiming that he only received part of the compensation required for his materials, services, creations and ideas, under the oral contract, prior to the cancellation of this contract on June 12, 1961. By making unfounded factual assumptions as to invoices submitted prior to June 12, 1961, and as to the alleged execution of the oral agreement prior to June 12, 1961, and by a complete misapplication of the doctrine concerning actions on account, this Court is in effect denying the Petitioner-Appellant his opportunity to prove the allegations in Count I of the Amended Complaint that this oral agreement was not fully executed, that he was not reasonably compensated prior to June 12, 1961, and that McDonald's still owes him for the reasonable value of his materials, ideas, creations and services, as set forth in the Amended Complaint (Appellant's Abstract pp. 3-11).

Respectfully submitted

By .....

Foss, Schuman & Drake

APPENDIX C

Corrected Opinion of the Appellate Court of Illinois, First District, filed 1-24-68

Mr. Justice Burke Delivered The Opinion Of The Court:

James Shrout, doing business as The Shrout Agency, filed an amended complaint consisting of three counts against McDonald's System, Inc., and Ray Kroc, president of McDonald's, demanding damages in the sum of $800,000 on a *quantum meruit* theory against McDonald's alone, in the sum of $45,000 on an inducement to a breach of contract theory against McDonald's alone, and of $1,661,000 on the theory of a conspiracy to interfere with contractual and other property rights against both McDonald's and Kroc. Defendants' motion to dismiss the amended complaint was allowed, and plaintiff appeals.

Count I of the amended complaint alleged that plaintiff and McDonald's entered into an oral agreement in May, 1957 whereby plaintiff agreed to provide advertising services for McDonald's in return for a "reasonable compensation." It was further alleged that plaintiff performed these services but was not reasonably compensated therefor. On June 12, 1961, the parties canceled the oral agreement and entered into a written agreement containing the following language:

> "The parties hereto agree to enter the present agreement and hereby revoke and cancel all previous agreements, contracts and commitments relating to the advertising and promotion programs heretofore entered into by said parties. . . ."

(Appendix C)

On September 1, 1961, McDonald's gave notice to plaintiff that the second contract would be terminated as of December 31, 1961.

Count II alleged that as advertising agent for McDonald's plaintiff procured the services of National Advertising Company, also known as Nadco, to furnish highway advertising for the holders of McDonald's franchises. In April, 1960 Nadco and McDonald's entered into an agreement in which Nadco recognized plaintiff as the advertising agent of McDonald's and agreed to pay plaintiff 15% of all monies received by it for its services as a commission. The count further alleged that in December, 1961, McDonald's directed Nadco to cease payments of the commissions to plaintiff, thereby interfering with plaintiff's contractual rights.

Count III alleged that on or about June 12, 1961, and for some time prior thereto, defendant Kroc, individually and as president of McDonald's, engaged in a course of conduct with McDonald's designed to deprive plaintiff of receipt of a reasonable compensation for his services as advertising agent of McDonald's.

Defendants' motion to dismiss the amended complaint was accompanied by affidavits and exhibits which revealed the following:

Pursuant to the oral contract of May, 1957, plaintiff performed the services required thereunder for which he periodically received from McDonald's compensation amounting to a total of $38,801.88; plaintiff cashed all payment checks and at no time protested the amounts of money he received. For some time prior to June, 1961, plaintiff failed to make payments to suppliers of merchandise and to the media which advertised McDonald's

products for their services and merchandise as he was required to do, and a written agreement was entered between plaintiff and McDonald's on June 12, 1961, terminating the oral agreement of May, 1957, and requiring plaintiff to furnish advertising services for an agreed compensation. From June 12, 1961, until December 31, 1961, when, as permitted under the contract, McDonald's terminated the contract, plaintiff rendered services as agreed in the written contract and submitted invoices in the amount of $25,431.65 for these services, which invoices were paid by McDonald's.

Before it terminated plaintiff's contract on December 31, 1961, McDonald's notified Nadco, on December 28, 1961, to cease all commission payments to plaintiff. Pursuant to this direction Nadco ceased the payments and plaintiff instituted legal action against it to recover certain commissions. Plaintiff thereafter received a consent judgment against Nadco in the amount of $11,000 and in return gave Nadco a general release from liability for further payments. The parties to the instant action subsequently filed a stipulation below to the effect that plaintiff herein was not demanding and was not entitled to actual damages against McDonald's under Count II and that it was seeking only punitive damages thereunder.

Plaintiff maintains that the contract of June 12, 1961, does not bar his claims set out in the amended complaint which alleges valid causes of action in *quantum meruit*, inducement to breach of contract, and conspiracy to deprive plaintiff of his reasonable compensation as advertising agent of McDonald's.

Plaintiff's claim under Count I is barred by the contract of June 12, 1961, which expressly states that the

parties thereto revoke and cancel "all previous agreements, contracts and commitments relating to the advertising and promotion programs" theretofore entered between the parties. The contention that an action in *quantum meruit* is "an action off the contract and not on the contract" is unavailing inasmuch as there did in fact exist between the parties a fully executed, express contract. See *Goodman* v. *Motor Products Corp.*, 22 Ill. App. 2d 378, 384-385.

Plaintiff is further barred from recovery under this count for the reason that the dealings between plaintiff and McDonald's under the oral contract resulted in an account stated between the parties which plaintiff is now estopped to deny. Throughout the term of the oral contract plaintiff was periodically compensated by McDonald's for his services as advertising agent. The monies paid by McDonald's were accepted by plaintiff without question or protest. It was not until some two and one-half years after the oral agreement was terminated that plaintiff determined he was entitled to more compensation under the oral contract than he had in fact received and accepted without contest. (See 1 C.J.S. Account Stated § 1 et seq.)

The cases cited by plaintiff in support of his position that an action in *quantum meruit* may be maintained under these circumstances are inapposite on their facts. The parties complaining in those cases received either none or only part of the compensation called for under the original contract before it was altered or abandoned. Here, however, plaintiff seeks additional compensation although the oral contract called for "reasonable compensation" and plaintiff did not object to the amounts

when received. See for example *Huehl* v. *Monarch Refrigerating Co.*, 157 Ill. App. 145; *United States* v. *Traylor Bros., Inc.*, 133 F. Supp. 104; *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 161 Fed. 2d 811.

Plaintiff's second contention is that McDonald's was guilty of malicious interference with his contractual rights in giving notice to Nadco to cease commission payments to him and that for this reason he is entitled to punitive damages from McDonald's. Plaintiff, however, fails to take into consideration that McDonald's gave notice to him that his contract was being terminated as of December 31, 1961, as it had a right to do under the terms of the contract, and that McDonald's accordingly served notice on Nadco to discontinue commission payments to plaintiff three days before the contract was terminated. Furthermore, plaintiff thereafter filed an action against Nadco and recovered $11,000 in commissions owing to plaintiff. It was stipulated below between the parties hereto that plaintiff was not entitled to actual damages from McDonald's under Count II, but that he was seeking solely punitive damages thereunder. Where actual damages are not recoverable, there can be no award of punitive damages. *Reeda* v. *The Tribune Co.*, 218 Ill. App. 45; *Madison* v. *Wigal*, 18 Ill. App. 2d 564. Assuming arguendo that Count II sounds in tort, as plaintiff maintains, plaintiff's recovery from and release of Nadco bars any recovery from McDonald's. See *Koltz* v. *Jahaaske*, 312 Ill. App. 623, 627-628.

Plaintiff cites *Northern Ins. Co. of New York* v. *Doctor*, 23 Ill. App. 2d 225, in support of the proposition that McDonald's fraudulently induced Nadco to break its contract with plaintiff. In that case the defendant fraudulently induced a release from the injured party plaintiff for an amount of the loss suffered over and above the

amount which plaintiff insurance company's policy of insurance would cover, thereby leaving the latter without subrogation recourse against the principal defendant. Here, however, McDonald's merely informed Nadco that plaintiff's contract was being terminated and that plaintiff was therefore no longer entitled to commissions.

The final point urged is that defendants conspired with each other to deprive plaintiff of his rightful and reasonable compensation as an advertising agent for McDonald's. It is well settled that a corporation can act only through its agents, and consequently there can be no conspiracy between a corporation and its agents. *John Deere Co.* v. *Metzler,* 51 Ill. App. 2d 340, 355. None of the cases cited by plaintiff in support of his position in this regard involve a conspiracy between a principal and its agents.

The acts which plaintiff claims to have been the subject of the conspiracy, namely depriving him of his commissions, amounted to nothing more than the acts of an employer paying plaintiff for services rendered to which no objections were made at the time. A combination to perform an act is not of itself wrongful; the act performed or sought to be performed must be wrongful and thereby lend its character to the combination. An actionable wrong cannot be made out by "vituperous and profuse interpolation of adjectives characterizing the act to be done as wrongfully done." *Skolnick* v. *Nudelman,* 71 Ill. App. 2d 424, 428.

For these reasons the judgment is affirmed.

Judgment Affirmed.

LYONS, P.J., and BRYANT, J., concur.

APPENDIX D

Petition for Leave to Appeal to the Supreme Court of Illinois, filed 2-28-68

James Shrout, d/b/a The Shrout Agency, hereby prays for leave to appeal as a matter of right from the judgment of the Appellate Court of Illinois, First District, or in the alternative prays for leave to appeal from the judgment of the Appellate Court of Illinois, First District.

I.

Judgment Below

On December 1, 1967, the Appellate Court of Illinois, First District, entered a judgment affirming defendant's motion to dismiss. Pursuant to an extension of time granted by the Appellate Court, a petition for rehearing was filed on January 10, 1968. Pursuant to the petition for rehearing, the Appellate Court modified its opinion of December 1, 1967, and on January 24, 1968, denied the petition for rehearing.

II.

Statement Of Points For Reversal

A. The Appellate Court for the First District has violated the rights of the petitioner-appellant to a jury trial as guaranteed by Article II, Section 5 of the Illinois Constitution and the Due Process clause of the 14th Amendment to the United States Constitution.

B. The Appellate Court for the First District and the trial court found certain facts on the defendant's motion

to dismiss in violation of Section 48, Chapter 110, I.R.S. (1967).

C. The Appellate Court for the First District enunciated the unfounded doctrine that the receipt of money by the plaintiff under an oral contract without protest on the part of plaintiff by itself resulted in "an account stated" which the plaintiff was estopped to deny.

D. Count I of the amended complaint of the plaintiff states a good cause of action in *quantum meruit*.

III.

Statement Of Facts

During May of 1957, Plaintiff and McDonald's System, Inc., entered into an agreement whereby plaintiff agreed to service the advertising needs of McDonald's System, Inc., and McDonald's agreed to pay plaintiff a reasonable compensation for such service (A. 2). Plaintiff thereupon, devised a unique advertising program for McDonald's, seeking to conserve McDonald's capital and to keep McDonald's borrowing power as unencumbered as possible (A. 2-6), Plaintiff was never reasonably compensated for this unique program (A. 6-11). By June 12, 1961 Plaintiff was in serious financial difficulties because of inadequate compensation for his service from McDonald's, but McDonald's had developed into a successful operating business making large sums of money (A. 11). McDonald's summoned plaintiff to its office in Chicago, Illinois, and told plaintiff that the present contractual relationship between McDonald's and plaintiff must be terminated, and they must enter into a new written contractual relationship. Plaintiff objected to the

restrictive nature of the proposed agreement. McDonald's told plaintiff that if he did not enter into this new written contractual relationship, he would be summarily dismissed as advertising agent for McDonald's (A. 11-12). On June 12, 1961, plaintiff signed a written contract with McDonald's, which contained the following language:

> "the parties hereto desire to enter into the present agreement and thereby revoke and cancel all previous agreements, contracts and commitments relating to the advertising and promotion programs heretofore entered into by said parties. . . ." (A. 20).

On September 1, 1961, McDonald's gave notice of the termination of plaintiff's contract pursuant to the terms of the written agreement effective on December 31, 1961 (A. 27). Plaintiff was never adequately compensated for his services prior to June 12, 1961, and there remains unpaid to him $800,000.00, which is the amount due to him from McDonald's as the reasonable value for such services (A. 13).

IV.

Argument.

A. ***The Appellate Court For The First District Has Violated The Rights Of The Petitioner-Appellant To A Jury Trial As Guaranteed By Article II, Section 5 Of The Illinois Constitution And The Due Process Clause Of The 14th Amendment To The United States Constitution.***

The Appellate Court in its decision of December 1, 1967, as modified on January 24, 1968, stated the following on pages 3 and 4 of the Opinion:

(Appendix D)

"Plaintiff's Claim under Count I is barred by the contract of June 12, 1961, which expressly states that the parties thereto revoke and cancel 'all previous agreements, contracts and commitments relating to the advertising and promotion programs' theretofore entered between the parties. The contention that an action in *quantum meruit* is 'an action off the contract and not 'on the contract' is unavailing inasmuch as there did in fact exist between the parties a fully executed express contract. See *Goodman* v. *Motor Products Corp.*, 22 Ill. App. 2d 378, 384-385.

"The cases cited by plaintiff in support of his position that an action in *quantum meruit* may be maintained under these circumstances are inapposite on their facts. The parties complaining in those cases received either none or only part of the compensation called for under the original contract before it was altered or abandoned. Here, however, plaintiff seeks additional compensation although the oral contract called for 'reasonable compensation' and plaintiff did not object to the amounts when received. See for example *Huehl* v. *Monarch Refrigerating Co.*, 157 Ill. App. 145; *United States* v. *Traylor Bros., Inc.*, 133 F. Supp. 104; *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 161 Fed. 2d 811."

In both of these aforementioned paragraphs, the Appellate Court found as a matter of fact that there was a fully executed and express contract between the parties prior to June 12, 1961. There was no such finding of fact by the trial court below. As the record makes clear, the trial court below found no facts whatsoever. Upon filing the original complaint in this matter, Petitioner-appellant demanded a jury (R. p. 3).

(Appendix D)

In his amended complaint, petitioner-appellant asserted that he was not paid a reasonable compensation pursuant to the oral agreement prior to June 12, 1961, so that the contract was not "fully executed". McDonald's, in an affidavit attached to its motion to dismiss the complaint, asserted that the petitioner-appellant was paid $38,801.88 and that petitioner-appellant accepted these payments without protest. Petitioner-appellant in the trial court below denied that he ever received a reasonable compensation pursuant to the oral contract and denied the contract was "fully executed", as well as asserting in his amended complaint that he was not fully compensated under the terms of the oral contract (A. pp. 1-13, Record pp. 54 and 56).

On the basis of these allegations and denials, the Appellate Court for the First District concluded, as a matter of fact, that the oral agreement prior to June 12, 1961, was *fully executed.* On the basis of this finding of fact, the Appellate Court then proceeded to decide that Count I of the amended complaint stated no cause of action, because there was an *express fully executed contract* in existence between the parties, which precluded any action in *quantum meruit.*

Article II, Sec. 5 of the Illinois Constitution of 1870 states in pertinent part as follows:

> "The right of trial by jury as heretofore enjoyed, shall remain inviolate; . . .".

The 14th Amendment to the United States Constitution states in pertinent part as follows:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . .".

(Appendix D)

Amendment 7 to the United States Constitution states in pertinent part as follows:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved . . .".

Petitioner-appellant contends that the finding by the Appellate Court of the First District that the oral contract prior to June 12, 1961, was fully executed was the determination of a substantial and crucial question of fact, which determination denied the constitutional rights of the petitioner-appellant under the above applicable provisions of the Illinois and United States Constitutions to the right of a trial by jury.

The dispute between the parties as to whether or not the oral contract from May of 1957 to June 12, 1961, was fully executed goes to the very heart of the claim of the petitioner-appellant in Count I of the amended complaint, and is, therefore, a question of great substance. In discussing the question of what rule to apply in the direction of a verdict in a jury trial, this court said recently:

> "Clearly, the Constitution does, and Judges should, carefully preserve the right of the parties to have a substantial factual dispute resolved by the jury, for it is here that assessment of the credibility of witnesses may well prove decisive." *Pedrick* v. *Peoria & Eastern RR Co.*, 37 Ill. 2d 494, 229 N.E. 2d, 504, at 510 (1967).

In applying the rule in the *Pedrick* case, the Appellate Court of Illinois, Fourth District, stated the following:

> "It is established in *Pedrick* that it is the responsibility of the court to ascertain and determine whether

there is, in fact, a substantial factual dispute which calls for resolution by a jury. The traditional role operates from two fundamental propositions: (1) *It is a constitutional right of the parties to have substantial factual disputes resolved by a jury,* and (2) in determining whether such substantial factual dispute exists, the court considers all of the evidence in its aspect most favorable to the party against whom the court is called upon to rule". *Manion* v. *Brant Oil Co.,* 85 Ill. App. 2d 129, 229 N.E. 2d 171, at 177 (1967). (Emphasis added).

In an earlier opinion, the Fourth District, in reversing a directed verdict, stated as follows:

"A party should not be deprived of his right to a jury trial if he has produced any evidence which proves or tends to prove his claim, or from which reasonable inferences can be drawn which tends to support his claim. The questions of preponderance of evidence or the credibility of witnesses are not involved". *Willoughby* v. *Moyer,* 50 Ill. App. 2d 462, 200 N.E. 2d 522, at 524 (1964).

In these cases and many others, the courts have been unanimous in holding that parties in civil litigation have a constitutional right to a trial by jury where there is a substantial dispute of fact between the parties.

In the case of *Diversey, a liquidating corporation* v. *Neunkirchen,* [sic] 370 Ill. 523, 19 N.E. 2d 363 (1939), this court declared unconstitutional paragraph 3 of rule 111 of the Rules of the Municipal Court of Chicago, which paragraph, in a motion for summary judgment, allowed a plaintiff to file affidavits "setting forth the belief of the affiant or affiants that the defendant's defense or defenses is, or are, not made in good faith but only for

the purpose of delay", even though the facts recited by the defendant in the counter-affidavit raised substantial questions of fact and a good defense. This court declared that paragraph unconstitutional on the grounds that a court, in order to determine whether or not the defense was set forth, not in good faith but only for the purposes of delay, had to first determine the truth or falsity of the facts recited, which was the question to be determined by the jury.

> "The Court cannot determine the truth of defendant's affidavit of merit in a summary judgment proceeding. The truth or falsity of facts disclosing a legal defense must be decided by a jury. Paragraph 3 of rule 111 is, therefore, void". 19 N.E. 2d 363, at 366.

During the course of finding paragraph three of rule 111 unconstitutional, this court stated the following:

> "The function of a jury is to decide disputed issues of the facts. But it is obvious that where no such issues are presented there can be no denial of the right to a jury trial. The purpose of a proceeding for summary judgment is to determine whether a defense exists. Where a defense raising an issue of the fact as to plaintiff's right to recover is set up, a summary judgment must be denied. *To try an issue of fact by affidavits would deprive defendant of his right to a jury trial*". 19 N.E. 2d 363 at 364. (Emphasis Added).

What the Appellate Court for the First District did in its opinion on December 1, 1967, as modified on January 24, 1968, was to decide an issue of fact on the basis of affidavits.

Petitioner-appellant submits that if such a procedure is allowed to stand without correction, then the right of any litigant to a trial by jury has been severely curtailed.

B. *The Appellate Court For The First District And The Trial Court Found Certain Facts On The Defendant's Motion To Dismiss In Violation Of Section 48, Chapter 110, I.R.S. (1967).*

By the finding of fact on appeal, the Appellate Court for the First District violated section 48, Chap. 110, I.R.S. (1967).

As set forth in Argument A hereinabove, the Appellate Court for the First District made certain findings of fact on pages three and four of its opinion below. Petitioner-appellant submits that these findings of fact, are in violation of the following provisions of the Civil Practice Act:

"Section 48 (Civil Practice Act. Sec. 48). Involuntary dismissal based upon certain defects or defenses.

". . . (3) If, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer *and shall so deny it if the action is one at law and a jury demand has been filed by the opposite party in apt time.*"

(Appendix D)

But just as the finding of facts by the Appellate Court violated the constitutional right of the petitioner-appellant to a trial by jury, so this same finding violates his right pursuant to section 48, insofar as that section specifically states that a motion to dismiss must be denied where material and genuine disputed questions of fact are raised, where the action is one at law and a jury demand has been filed in apt time. Petitioner-appellant is entitled to a full and complete trial, is entitled to produce evidence that he was not reasonably compensated as required by the oral contract, which was in existence from May, 1957, to June 12, 1961, and that a reasonable value of his material, ideas and services are far in excess of the amounts he received. If not, then McDonald's is allowed to defeat the action in *quantum meruit* by a mere assertion, without a hearing, which deprives Petitioner-appellant of a trial on the merits, as required by section 48.

The only evidence before the trial court and the Appellate Court regarding the alleged "fully executed" oral contract is the following statement from the affidavit of John H. Horn filed in support of defendant's motion to dismiss the amended complaint of plaintiff:

> "3. Prior to June 12, 1961, Shrout was paid a total of $38,801.88 by McDonald's for all advertising services, advertising and supplies performed and furnished by Shrout pursuant to all oral understandings between Shrout and McDonald's which were then in effect. At no time during this period did Shrout refuse or fail to cash checks in connection with said payments and at no time did he claim that such payments were in violation of any oral understanding with McDonald's. At no time during

this period did Shrout claim any interest or property right in any of the ideas, symbols, slogans, designs or other matter produced by him for McDonald's in the course of his advertising agency relationship with McDonald's . . .". Appellees' Supplemental Abstract pp. 31-32.

This statement is not a sufficient basis for the Appellate Court to determine if the oral contract prior to June 12, 1961, was "fully executed". Certainly, the fact that this sum of money was accepted by petitioner-appellant without protest cannot support the conclusion that he was fully compensated, unless some sort of arbitrary presumption is allowed to prevail in spite of the denials and statements of the petitioner-appellant, heretofore cited on pages 4-5 of this petition. Petitioner-appellant submits that in light of the factual determination made by the Appellate Court, the question of the application of section 48 in that regard is one of significant importance. Further, petitioner-appellant submits that this factual determination by the Appellate Court is in such direct conflict with the law, that there is need for the exercise of the Supreme Court's supervisory authority in this matter.

C. *The Appellate Court For The First District Enunciated The Unfounded Doctrine That The Receipt Of Money By The Plaintiff Under An Oral Contract Without Protest On The Part Of Plaintiff By Itself Resulted In "An Account Stated" Which The Plaintiff Was Estopped To Deny.*

In its opinion, the Appellate Court stated, as one of the grounds of its decision, the following:

(Appendix D)

"Plaintiff is further barred from recovery under this Count for the reason that the dealings between plaintiff and McDonald's under the oral contract resulted in an account stated between the parties which plaintiff is now estopped to deny. Throughout the term of the oral contract plaintiff was periodically compensated by McDonald's for his services as advertising agent. The monies paid by McDonald's were accepted by plaintiff without question or protest. It was not until some two and one-half years after the oral agreement was terminated that plaintiff determined he was entitled to more compensation under the oral contract than he had in fact received and accepted without contest. (See I C.J.S. Account Stated § 1 et seq.)".

Petitioner-appellant has failed to find any basis whatsoever in Corpus Juris Secundum, pp. 579-636, for the position of the Court that the acceptance of the payments by the petitioner-appellant estops him from asserting that these payments were not full payment under the oral contract. An action on account is based upon an account submitted by one party to another prior to the institution of an action, which the second party has not protested and has not paid. On the basis of the record, there was no account submitted by petitioner-appellant to McDonald's or by McDonald's to petitioner-appellant.

Even if the payment of the $38,801.88 can be construed to be some sort of an account between the parties, there is no basis for the Court to state that this constitutes an absolute defense whereby petitioner-appellant is precluded from introducing evidence and proving the defendant owes him money in excess of the amounts

shown in the account. The citation from Corpus Juris Secundum is the only citation stated by the Appellate Court in support of its position, and provides no support in any way for the legal position taken by the Appellate Court.

Petitioner-appellant submits that the question of the meaning of the doctrine of account stated is one of great importance in light of its application by the Appellate Court in this case. The question of whether this doctrine can be used as an absolute defense to a claim in *quantum meruit* is one of first impression. It is the position of petitioner-appellant that this doctrine was erroneously applied in this case and must be corrected by a decision of this Court.

D. *Count I Of The Amended Complaint Of The Plaintiff States A Good Cause Of Action In Quantum Meruit.*

Plaintiff-petitioner asserts that Count I of his amended complaint states a good cause of action in *quantum meruit* against McDonald's System, Inc. (A (1)-(13)). Apparently, the Appellate Court, in its opinion, agrees that this claim is good, but insists, in its fact finding role, that the plaintiff is not entitled to bring the action. In this regard, we call this Court's attention to the case of *Huehl* v. *Monarch Refrigerating Co.*, 157 Ill. App. 145, at 148 (1910), where the following position was taken with regard to the type of action in *quantum meruit* presented in Count I of the amended complaint:

> "We think that it may be fairly said that the original contract never having been carried out, appellees were entitled to recover their whole claim on a

quantum meruit basis. The abandonment being with the tacit consent of the parties, left appellees at liberty to proceed on *quantum meruit* as a basis of recovery".

In Count I of the Amended Complaint, petitioner-appellant alleges that he was not fully compensated for the services rendered pursuant to the oral contract between himself and McDonald's. On the basis of long standing Illinois law, as exemplified by the *Huehl* case, this states a good cause of action.

In the trial court below, McDonald's maintained that the written contract of June 12, 1961, was a complete bar to any action regarding the oral contract, whether in *quantum meruit* or for breach of contract. On page 3 of its opinion, the Appellate Court held that the contract was a bar to an action for breach of contract on the one hand, and on the other hand, stated that no *quantum meruit* would lie because "there did, in fact, exist between the parties a fully executed express contract". Apparently, therefore, if the Appellate Court had not engaged in its erroneous fact finding mission, it would have agreed with the contention of petitioner-appellant that the language of the contract of June 12, 1961, barred only a action for breach of contract and not an action in *quantum meruit.*

When joined with the erroneous and unconstitutional finding of fact by the Appellate Court for the First District, this question of whether or not Count I alleges a good action in *quantum meruit* becomes a question of general importance for the State of Illinois. Petitioner-appellant submits that it would be extremely detrimental

to well pleaded causes of action in *quantum meruit* for the defendant to be able to defeat it by a mere assertion of "full execution of the express contract", and thereby convince a court that this is the fact, without allowing the plaintiff to produce evidence that indeed the contract was not executed and that he was not fully compensated.

Respectfully submitted,

Foss, Schuman & Drake

By: .....

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APPENDIX E

Denial of Petition for Leave to Appeal, filed 5-28-68

(Letterhead Of)

State of Illinois

Office Of

CLERK OF THE SUPREME COURT

Springfield

May 28, 1968

Messrs. Foss, Schuman & Drake
Attorneys at Law
11 South LaSalle Street
Chicago, Illinois 60603

Gentlemen:

In Supreme Court today, in Case No. 41243 entitled:

James Shrout, d/b/a The Shrout Agency, petitioner

vs.

McDonald's System, Inc., an Illinois corporation, et al., respondents

Petition for Leave to Appeal was: *Denied.*

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

APPENDIX F

Issuance of Mandate by the Supreme Court of Illinois, 6-19-68

June 19, 1968

To Attorneys Of Record:

You are hereby notified that mandates were issued today to the proper Appellate Courts in the following cases:

Clerk of the Supreme Court

• • • • • •

No. 41243—James Shrout, d/b/a The Shrout Agency, petitioner, vs. McDonald's System, Inc., an Illinois corporation, et al., respondents. Appellate Court, First District.

• • • • • •

APPENDIX G

Article II, Section 5, Illinois Constitution of 1870

§ 5. Trial by jury

The right of trial by jury as heretofore enjoyed, shall remain inviolate; but the trial of civil cases before justices of the peace, by a jury of less than twelve men, may be authorized by law.

APPENDIX H

Ch. 110, Sec. 48 (Ill. Rev. Stats., 1967)

§ 48. (Civil Practice Act, § 48). Involuntary dismissal based upon certain defects or defenses

(1) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

(a) That the court does not have jurisdiction of the subject matter of the action, provided the defect cannot be removed by a transfer of the case to a court having jurisdiction.

(b) That the plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued.

(c) That there is another action pending between the same parties for the same cause.

(d) That the cause of action is barred by a prior judgment.

(e) That the action was not commenced within the time limited by law.

(f) That the claim or demand set forth in the plaintiff's pleading has been released, satisfied of record, or discharged in bankruptcy.

(g) That the claim or demand asserted is unenforceable under the provisions of the Statute of Frauds.

(h) That the claim or demand asserted against defendant is unenforceable because of his infancy or other disability.

(Appendix H)

(i) That the claim or demand asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim or demand.

(2) A similar motion may be made by any other party against whom a claim or demand is asserted.

(3) If, upon the hearing of the motion, the opposite party presents affidavits or other proof denying the facts alleged or establishing facts obviating the grounds of defect, the court may hear and determine the same and may grant or deny the motion. If a material and genuine disputed question of fact is raised the court may decide the motion upon the affidavits and evidence offered by the parties, or may deny the motion without prejudice to the right to raise the subject matter of the motion by answer and shall so deny it if the action is one at law and a jury demand has been filed by the opposite party in apt time.

(4) The raising of any of the foregoing matters by motion under this section does not preclude the raising of them subsequently by answer unless the court has disposed of the motion on its merits; and a failure to raise any of them by motion does not preclude raising them by answer.

(5) Pleading over after denial by the court of a motion under this section is not a waiver of any error in the decision denying the motion.

(6) The form and contents of and procedure relating to affidavits under this section shall be as provided by rule. 1933, June 23, Laws 1933, p. 784, art. 7, § 48; 1951, July 23, Laws 1951, p. 1707, § 1; 1955, July 19, Laws 1955, p. 2238, § 1.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 25 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 476

JAMES SHROUT, d/b/a THE SHROUT AGENCY,
Petitioner,

vs.

McDONALD'S SYSTEM, INC., an Illinois corporation, and RAY KROC,
Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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IN THE

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Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

STATEMENT OF THE CASE

Petitioner's Statement of the Case ignores Supreme Court Rule 23(f), and omits numerous important facts relied upon by the Illinois Circuit Court, Appellate Court and Supreme Court in rejecting petitioner's claim. Reluctantly, respondents submit herewith their own statement.

Petitioner's advertising agency was paid a total of $64,295.33 by respondent McDonald's in return for services rendered from May, 1957 to December 31, 1961. From May, 1957 to June 12, 1961 petitioner performed such services and received from McDonald's total payment of $38,801.88. Petitioner cashed all payment checks and at no time protested the amounts.

During this period, McDonald's licensees paid petitioner for certain advertising merchandise, but petitioner failed to pay the merchandise suppliers. These suppliers then repeatedly harassed the licensees for payment. Since they had already paid, the licensees then complained to McDonald's about petitioner. As a result, the parties realized that the arrangement was unworkable, and decided to enter into a new arrangement.

On June 12, 1961, petitioner and McDonald's executed a written agreement terminating the oral agreement and any other obligations and requiring petitioner to furnish further advertising services and supplies for an agreed compensation. This agreement operated under the following provision to sever all prior obligations:

> "The parties hereto desire to enter into the present agreement and thereby revoke and cancel all previous agreements, contracts and commitments relating to the advertising and promotion programs heretofore entered into by said parties . . ."

Thereafter petitioner performed advertising services under the written agreement in return for $25,493.45. The written agreement was then terminated pursuant to its terms as of December 31, 1961.

The original complaint, containing a jury demand, was filed December 31, 1963 "IN EQUITY," seeking, *inter alia*, rescission of the written agreement of June 12, 1961. The rescission Count was stricken as legally insufficient on December 2, 1964 and the remainder of the action was ordered transferred from the Equity Division to the Law Division of the Circuit Court of Cook County, Illinois. The Law Division then dismissed the remainder of the original complaint. At the time of the transfer from Equity to Law, petitioner did not renew its jury demand, nor did it include such a demand in the subsequently filed amended complaint.

Respondents then moved to dismiss the amended complaints under Sections 45 and 48 of the Civil Practice Act of Illinois, Ill. Rev. Stat. 1967, ch. 110, §§ 45, 48, on the ground that the claim for additional compensation prior to June 12, 1961 was barred, *inter alia,* by the express language of the written agreement quoted above. Supporting and counter-affidavits were filed, and the Circuit Court, after briefing and oral argument, dismissed the amended complaint.

Petitioner appealed to the Illinois Appellate Court which, after extensive briefing and oral argument by the parties, affirmed in part as follows (App. 18a - 19a)[1]:

> "Plaintiff's claim under Count 1 [the only one petitioner now advances] is barred by the contract of June 12, 1961, which expressly states that the parties thereto revoke and cancel 'all previous agreements, contracts and commitments relating to the advertising and promotion programs' theretofore entered between the parties. . . ."
>
> "Plaintiff is further barred from recovery under this count for the reason that the dealings between plaintiff and McDonald's under the oral contract resulted in an account stated between the parties which plaintiff is now estopped to deny. Throughout the term of the oral contract plaintiff was periodically compensated by McDonald's for his services as advertising agent. The monies paid by McDonald's were accepted by plaintiff without question or protest. It was not until some two and one-half years after the oral agreement was terminated that plaintiff determined he was entitled to more compensation under the oral contract than he had in fact received and accepted without contest. (See 1 C.J.S. Account Stated § 1 et seq.)"

Petitioner filed a petition for rehearing in the Illinois Appellate Court (App. 8a - 15a), but did not raise any of the federal constitutional questions presented in the instant

[1] App. references are to petitioner's appendices.

certiorari petition. The Appellate Court denied the petition without opinion.

Petitioner then filed a petition for leave to appeal in the Illinois Supreme Court (App. 22a - 36a), for the first time raising the due process question presented in Part I of the instant certiorari petition but not raising the equal protection question presented for the first time in Part II of the instant certiorari petition. The Illinois Supreme Court denied the petition without opinion (App. 37a).

ARGUMENT

Preface:

After having its claim for additional compensation in effect rejected by no less than *three* State courts (Circuit, Appellate and Supreme), petitioner has seized upon a single Appellate Court dictum in a desperate search for a federal constitutional issue. However, since neither the due process nor the equal protection issues here advanced were presented in timely fashion below, this Court is without jurisdiction to grant certiorari. Similarly, jurisdiction is lacking because the claim for additional compensation was rejected on non-federal grounds which are not here questioned.

Moreover, the claim of deprivation of equal protection is not well founded. Under Illinois statute, the constitutionality of which is not here questioned, petitioner waived its jury demand by failing to renew it when the case was transferred from Equity to Law. The petition should be dismissed for lack of jurisdiction or denied.

I.

THIS COURT LACKS JURISDICTION TO GRANT THE WRIT OF CERTIORARI; NO CONSTITUTIONAL RIGHT OF PETITIONER WAS INVADED BY THE ILLINOIS APPELLATE COURT CHARACTERIZING THE ORAL ARGUMENT AS "FULLY EXECUTED" AND "EXPRESS".

Petitioner's main contention is that the Illinois Appellate Court characterization of the oral agreement violated its constitutional rights under the fourteenth amendment. It raised this question for the first time, not in its petition for rehearing addressed to the Illinois Appellate Court, but as an afterthought in its petition to the Illinois Supreme Court for leave to appeal. Thus, the constitutional issue

was not presented to the Appellate Court, although it could have been, and the Appellate Court had no opportunity to correct itself. Petitioner did not discharge its burden to present the question at the earliest time and to obtain a decision from the highest state court.

This case thus falls within the well-established rule that the Supreme Court will not review a federal question which was not properly raised before the highest state court. As this court stated in *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1965):

> "The federal question was never properly presented to the state supreme court unless upon motion for rehearing; and that court then refused to consider it. The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it (citing cases)."

In the instant case neither the Illinois Appellate Court nor the Illinois Supreme Court ruled on the federal constitutional question. Accordingly, the question is not proper for a certiorari petition.

Furthermore, the Supreme Court is without jurisdiction because it will not review a state court decision resting upon an adequate and independent non-federal ground. Petitioner's Count I claim for further compensation was held by the Illinois Appellate Court to be barred by the express language of the agreement of June 12, 1961, and because there was an account stated which, under state law, precluded further recovery. Petitioner makes no claim that either of these holdings were incorrect, that they constituted findings of fact, or that they raise important questions of federal or state law which are appropriate for review on certiorari. Thus, petitioner is resigned to the fact that on the non-federal merits its claim has no hope.

The sole argument addressed to this Court concerns the remark the Appellate Court made in refuting petitioner's *quantum meruit* argument, a remark made immediately *after* it had held that the claim was barred by the written agreement:

> "Plaintiff's claim under Count I is barred by the contract of June 12, 1961, which expressly states that the parties thereto revoke and cancel 'all previous agreements, contracts and commitments relating to the advertising and promotion programs' theretofore entered between the parties. The contention that an action in *quantum meruit* is 'an action off the contract and not on the contract' is unavailing inasmuch as there did in fact exist between the parties a fully executed express contract. See *Goodman* v. *Motor Products Corp.*, 22 Ill. App. 2d 378, 384-385."

At this point, two things are clear. First, in view of the court's interpretation of the legal import of the written agreement, designating the oral contract as "executed" was a *legal* question for a court, not a fact question for a jury. Indeed, in the face of the express language relied upon by the court, could the prior oral contract be termed anything but fully executed? Clearly not. No amount of further evidence by petitioner could possibly change the legal effect of the written agreement.

Second, the remark that there had been a "fully executed express contract" is dictum, and the result would have been the same no matter how the contract had been characterized. It is clear that nothing turns on this remark. Petitioner is saying that a purely hypothetical question may somehow be transformed into a full-blown constitutional question eligible for Supreme Court review, notwithstanding that its resolution will have no effect on the legal rights of the parties or the correctness of the lower court decision.

This is an incorrect view of Supreme Court jurisdiction. The rule was concisely stated by this Court in *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 129 (1945):

> "This brings the situation clearly within the settled rule whereby this Court will not review a State court decision resting on an adequate and independent non-federal ground even though the State court may have also summoned to its support an erroneous view of federal law. 'Where the judgment of the state court rests on two grounds, one involving a federal question and the other not . . . and the ground independent of a federal question is sufficient in itself to sustain it, this Court will not take jurisdiction.' *Lynch* v. *New York*, 293 U.S. 52, 54-55."

In addition, the Appellate Court's reliance on the *Goodman* case further demonstrates the correctness of the characterization. It is hornbook law, and law in Illinois for over a century, that where an express contract exists a court may not imply one. In *Goodman* the Illinois court affirmed the dismissal of a count which pleaded *quantum meruit* where an express contract existed, on the following ground:

> "There can be no implied contract or recovery in *quantum meruit* where an express contract exists between the same parties with respect to the same subject matter . . . only when parties do not expressly agree, or where an express agreement is unenforceable, the law imposes and raises a promise to pay for services performed or goods furnished under circumstances justifying an implied agreement to compensate." 22 Ill. App. 2d 378, 384-85 (1959).

Thus, since there was at all times from May, 1957 to June 12, 1961 an express oral agreement to perform services for reasonable compensation, there could not have been a meri-

torious *quantum meruit* claim. In fact, it does not even matter that an express agreement may be "executed". The mere fact of its *existence* forecloses *quantum meruit*. Here, too, further evidence by petitioner would be unavailing.

The Appellate Court based its affirmance on uncontraverted facts—the language of the agreement and the acceptance of monies by petitioner without protest. Petitioner's claim has been fully litigated and decided with proper deliberation, and there is no constitutional issue correctly presented for review.

II.

PETITIONER DID NOT RAISE THE EQUAL PROTECTION ISSUE IN TIMELY FASHION.

Petitioner claims that the Appellate Court deprived it of "equal protection" by denying it a jury trial. Actually, this ground was never presented to *any* of the State Courts involved, and is urged here for the first time. Petitioner contended for the first time in its petition for appeal to the Illinois Supreme Court, and not before the Appellate Court, that its jury trial right had somehow been abridged under the seventh and fourteenth amendments to the United States Constitution. However, it abandoned these grounds in the face of *Walker* v. *Sauvinet*, 92 U.S. 90 (1875), *Pearson* v. *Yewdall*, 95 U.S. 294, 296 (1877), and *Oleson* v. *Trust Co. of Chicago*, 245 F.2d 522, 524 (7th Cir.), *cert. denied*, 355 U.S. 896 (1957), which hold that neither amendment guarantees a jury trial in a state court civil case. The "equal protection" assertion, made to this Court for the first time, was not made in timely fashion and hence cannot form a jurisdictional basis for granting the writ.

III.

PETITIONER, HAVING WAIVED ITS JURY RIGHT UNDER VALID STATE LAW, HAD NO CONSTITUTIONAL RIGHTS VIOLATED.

In addition, petitioner waived its jury right by failing to comply with the express requirement of the Civil Practice Act of Illinois, Ill. Rev. Stat. 1967, ch. 110, § 64 that:

> ". . . in any proceeding transferred in whole or in part from the equity docket to the law docket a plaintiff desirous of a trial by jury must file his demand with the clerk within three days from the day the order of transfer is entered . . . otherwise the party waives a jury . . ."

The original complaint was expressly denominated and was filed "IN EQUITY". No authority need be cited for the proposition that there is no jury trial of right in equity cases. On December 2, 1964, when the rescission count was stricken, the remaining cause was expressly ordered transferred from the Equity Division to the Law Division of the Circuit Court. Since the petitioner did not file a jury demand within three days, it waived a jury.

Secondly, petitioner's reliance on Ill. Rev. Stat. 1967, ch. 110 § 48 (Petition, p. 13) is entirely misplaced. It is only where a "material and genuine disputed question of fact is raised" that the court must deny the motion to dismiss "if the action is one at law and a jury demand has been filed by the opposite party in apt time." In the instant case, there were no material facts which were disputed. Petitioner's repeated insistence that it was not "fully paid" is mere hyperbole. Moreover, the case was not filed "at law", and a jury demand was not filed "in apt time."

As far as "equal protection" is concerned, it is clear from the foregoing provisions of the Civil Practice Act of Illinois that all litigants in petitioner's position are treated the same. The prison inmate case and other cases relied upon by petitioner are inapposite. No litigant which waives jury trial subsequently becomes eligible for such trial as a matter of right.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be dismissed for lack of jurisdiction, or denied.

Respectfully submitted,

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APPENDIX

1. Ill. Rev. Stat. 1967, ch. 110, § 45(1), (2), (4).

§ 45. **Motions with respect to pleadings.** (1) All objections to pleadings shall be raised by motion. The motion shall point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed, or that a pleading be made more definite and certain in a specified particular, or that designated immaterial matter be stricken out, or that necessary parties be added, or that designated misjoined parties be dismissed, and so forth.

(2) If a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein the pleading or division thereof is insufficient.

• • •

(4) After rulings on motions, the court may enter appropriate orders either to permit or require pleading over or amending or to terminate the litigation in whole or in part.

• • •

2. Ill. Rev. Stat. 1967, ch. 110, § 48(1)(i).

§ 48. **Involuntary dismissal based upon certain defects or defenses.** (1) Defendant may, within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit:

• • •

(i) That the claim or demand asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim or demand.

• • •

3. Ill. Rev. Stat. 1967, ch. 110, § 64(1), (2).

§ 64. **Jury demands—Findings of fact in law and equity cases—Effect of overruling motion for finding in non-jury cases.** (1) A plaintiff desirous of a trial by jury must file a demand therefor with the clerk at the time the action is commenced. A defendant desirous of a trial by jury must file a demand therefor not later than the filing of his answer. Otherwise, the party waives a jury. In any proceeding transferred in whole or in part from the equity docket to the law docket a plaintiff desirous of a trial by jury must file his demand with the clerk within 3 days from the day the order of transfer is entered and a defendant desirous of a trial by jury shall file his demand within 6 days from that day; otherwise the party waives a jury. If the plaintiff files a jury demand and thereafter waives a jury, the defendant shall be granted a jury trial upon demand therefor made promptly after being advised of the waiver and upon payment of the proper fees, if any, to the clerk.

(2) No special findings of fact, propositions of law, motion for a finding or demurrer to the evidence are necessary in any case at law tried without a jury to support the judgment or as a basis of review. The sufficiency of the evidence to support the judgment is subject to review without formal action to preserve the question.

• • •